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Supreme Court, U.S.

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No. ____

In the
Supreme Court of the United States
October Term, 1993

Robert D. Fischl,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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79 pp

QUESTION PRESENTED

Whether a collateral challenge to a federal criminal conviction brought under 28 U.S.C. Section 2255 may properly be dismissed without an evidentiary hearing where the challenge requires the resolution of "a clear-cut conflict" between the accounts of material witnesses.

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Robert D. Fischl,

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United States of America,

Respondent.

Petition For a Writ of Certiorari
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for the Sixth Circuit

Robert D. Fischl respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, 28a-50a) is unreported. The opinion of the district court (App. A, *infra*, 1a-27a) is also unreported.

JURISDICTION

The court of appeals entered its judgment on October 25, 1993 (App. B, *infra*, 28a) and denied a timely filed petition for rehearing on December 28, 1993 (App. C, *infra*,

51a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2255 provides for collateral challenges to federal criminal convictions by means of a motion in district court for vacation of sentence. That provision provides in pertinent part:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon . . . .

STATEMENT

A. Introduction

Pursuant to 28 U.S.C. § 2255, Robert D. Fischl filed in the district court a motion to vacate his federal sentence and sought an evidentiary hearing to establish, among other things, the ineffective assistance of counsel in the underlying criminal trial. In a nutshell, Fischl contends that trial counsel's failure to consult him with respect to an abrupt and dramatic change of strategy improvised in the middle of Fischl's criminal trial denied him his Sixth Amendment rights under this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). The district court rejected Fischl's challenge, and the court of appeals affirmed. Neither of the courts below disputed Fischl's contention that the alleged failure to consult constitutes ineffective assistance under the standards announced in *Strickland*; nor did either court contradict Fischl's showing that this failure would have preju-

diced Fischl's right to a fair trial. Rather, both courts rejected the factual predicate on which Fischl's claim is based. In so doing, the courts resolved against Fischl what the court of appeals frankly acknowledged was a "clear-cut conflict" (App. B, *infra*, 37a) between the respective accounts of material witnesses, and did so without affording Fischl the benefit of an evidentiary hearing in which to test his claim.

What follows, then, are the facts pertinent to Fischl's claim of ineffective assistance in the underlying criminal trial and to the disposition of that claim by the district court and the court of appeals in these collateral proceedings. With a single exception---which we will note below---these facts are not disputed by the parties.

B. The Underlying Case

In 1984, Fischl was indicted together with Co-defendant Charles Kerkman on twelve counts of mail fraud, tax fraud, and related offenses (App. A, *infra*, 2a). The case was assigned to the Honorable Richard A. Enslen of the United States District Court for the Western District of Michigan (*id.* at 1a-2a). Before trial and again as the trial commenced, Fischl's trial counsel moved for severance of Fischl's case from Kerkman's---citing "hostility and personal animus" between the defendants (App. B, *infra*, 38a)---and the trial court denied the motions (*id.* at 31a). By the close of the Government's case, however, "things [had] warmed up a little bit" between the defendants, and trial counsel was concededly of the view that the "damage" to Fischl had "frankly, been done" by the fact that the jury had already heard the Government's case against Co-defendant Kerkman (App. D, *infra*, 52a-53a, 54a, 55a,); counsel did not renew the severance motion at that time.

The trial court decided by the "flip of a coin" that Fischl's defense would proceed before Kerkman's (App. B, *infra*, 31a). Pursuant to the "advice and recommendation" of counsel, Fischl rested without presenting evidence (*id.* at 31a-32a). The nature of this "advice and recommendation" raises the sole factual conflict in this case in its present posture. Fischl contends that he accepted trial counsel's recommendation to rest without presenting evidence only because he was assured---in the course of a meeting with trial counsel, Co-defendant Kerkman, and Kerkman's attorney held prior to the decision to rest---that a defense on his behalf would be offered by Kerkman's attorney (*id.* at 35a). For his part, Fischl's trial counsel concedes (App. D, *infra*, 53a-54a) that the meeting in question was held, but denies (*id.* at 52a) that he had ever intended to "rel[y]" on Kerkman's attorney "to carry the ball" for Fischl.

In any event, the defense Fischl contends he was expecting from Kerkman's counsel was never to be. Thus, when Kerkman's attorney began to present the defense on which Fischl was expecting to rely, his trial counsel objected that "the jury should not consider this evidence as it relates to Mr. Fischl" (App. B, *infra*, 32a). After a brief discussion with counsel, the trial court declared a recess to consider the quandary posed by the fact that the jury was now listening to Kerkman's case after both the Government and Fischl had closed in Fischl's---an unfortunate situation that eventually led to a mistrial of Kerkman, to a double-jeopardy challenge to Kerkman's retrial, and in the end to these collateral proceedings as well. See *United States v. Kerkman*, No. 85-1141, slip op. at 3 (6th Cir. Oct. 18, 1985), reported at 779 F.2d 53 (table).

During the recess, the trial court summoned the parties and counsel into chambers and conducted an off-the-record session (App. B., *infra*, 32a-33a). The trial court

thereupon unexpectedly announced its intention to "bifurcate" the case and asked trial counsel whether Fischl's original motion to sever "was still on the table." Without turning to look at his client, counsel raised his right arm and responded, "Yes, your honor." (*Id.* at 32a.) As they returned to the courtroom, Fischl---who, like most individuals who have never been to law school, had never heard the word "bifurcate" before---asked counsel to explain to him what had just taken place (*id.*). In response, trial counsel explained that they were forced to accept this extraordinary procedural maneuver or would otherwise face the prospect that a challenge to the trial court's earlier refusal to grant a severance would be "waive[d]" on appeal (*id.*). When Fischl expressed his concern that this would mean that the jury would not hear any defense on his behalf, trial counsel responded, "Don't worry about it, it won't hurt you. They don't have a case" (*id.* at 32a-33a).

When the proceedings resumed on the record, the trial court sent Fischl's case to the jury without objection from counsel, and the jury convicted Fischl on six counts of the indictment (*id.* at 33a). Shortly thereafter, the trial court sentenced Fischl to one year's imprisonment and five years of probation, and imposed a fine and an order of restitution (*id.*). In an opinion dated July 30, 1986, the court of appeals affirmed Fischl's convictions. *United States v. Fischl*, 797 F.2d 306.

C. The Collateral Proceedings

1. *The Filing of the § 2255 Motion*

Four-and-one-half years after his direct appeal failed, but prior to the expiration of his probationary term, Fischl filed in the district court the instant motion for vacation of

sentence pursuant to 28 U.S.C. § 2255 (App. B, *infra*, 3?a).[1] The case was assigned to the Honorable Richard A. Enslen, the same judge who had presided over Fischl's original trial (App. A, *infra*, 1a).

In the district court, Fischl alleged, among other things, the ineffective assistance of trial counsel under the two-prong test set forth by this Court in *Strickland*. First, Fischl contended that trial counsel's failure to consult him in advance with respect to the abandonment of the trial strategy he had been led to expect---i.e., the presentation of a defense on his behalf by the attorney for Co-defendant Kerkman---constituted a clear and unambiguous violation of the standards for competent representation under *Strickland*, 466 U.S. at 688 (describing counsel's obligation to "consult with the defendant on important decisions" as among the most "basic duties" under the Sixth Amendment). Second, Fischl argued that the ineffective assistance was prejudicial to his right to a fair trial, since a constitutionally competent defense

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[1]The Government in these proceedings has not disputed that Fischl's probationary status made him a person "in custody" for purposes of the statute. See, e.g., *United States v. Spawr Optical Research, Inc.*, 864 F.2d 1467, 1470 & n.5 (9th Cir. 1988), cert. denied, 493 U.S. 809 (1989); *Wright v. United States*, 732 F.2d 1048, 1050 & n.1 (2d Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *United States v. Lopez*, 704 F.2d 1382, 1384 n.2 (5th Cir.), cert. denied, 464 U.S. 935 (1983); *United States v. Condit*, 621 F.2d 1096, 1098 (10th Cir. 1980). Although Fischl's probationary term has expired since the initial filing, "once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of the proceedings on such application." *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). Nor can there be any claim that the release from probation has rendered this cause moot. See *id.* at 237 (concluding that "disabilities or burdens [that] may flow" from criminal conviction defeat mootness claim under 28 U.S.C. § 2254; citation omitted); see also *United States v. Loschiavo*, 531 F.2d 659, 662 (2d Cir. 1976) (reaching same construction under 28 U.S.C. § 2255); *Ohrynowicz v. United States*, 542 F.2d 715, 717 n.3 (7th Cir.), cert. denied, 429 U.S. 1027 (1976) (same).

would have established his innocence of each and every count in the indictment. See *Strickland*, 466 U.S. at 696 (defendant must show that result would "reasonably likely have been different" absent the ineffective assistance). Accordingly, Fischl sought an evidentiary hearing to establish his claims and thus to press for vacation of sentence. (App. A, *infra*, 18a-20a.)

2. *The Decision of the District Court*

The district court denied Fischl's request for an evidentiary hearing, but granted the Government's request to depose Fischl's trial counsel in order to prepare its response to Fischl's motion. *United States v. Fischl*, No. 1:84:CR:17-02 (W.D. Mich. Dec. 23, 1991) (unpublished order). In its decision on the merits, the court did not dispute Fischl's contention that counsel's unilateral abandonment of the trial strategy Fischl had been led to expect violated the standards articulated by this Court in *Strickland*. But the court found that trial counsel, in his deposition, had "flatly denie[d] that it was ever the plan to rely on Kerkman to defend Fischl" (App. A, *infra*, 24a) and concluded that the deposition formed a sufficient basis for rejecting Fischl's claim on this issue without an evidentiary hearing (*id.* at 20a). Accordingly, the court did not reach Fischl's claim that the conduct he alleged by counsel prejudiced his right to a fair trial.[2]

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[2]Had the court reached this issue, there is reason to believe that it would have concluded that Fischl's claim of prejudice warrants an evidentiary hearing. Thus, Co-defendant Kerkman has filed a § 2255 motion in which he also alleges ineffectiveness of counsel and prejudice under *Strickland*—the latter point essentially tracking Fischl's claim that a constitutionally competent defense would have established that co-defendants were innocent of all of the charges against them. *United States v. Kerkman*, No. 1:84:CR:17-01 (W.D. Mich.) (filed July 19, 1991). Although that case was also initially assigned to Judge Enslen, for reasons not pertinent here he recused himself, and the case

3. *The Decision of the Court of Appeals*

Fischl appealed, and the court of appeals affirmed (App. B, *infra*, 50a). The court acknowledged that the conduct Fischl attributed to counsel would violate the standards of *Strickland* (*id.* at 35a), but it agreed with the district court that Fischl's claim was fatally undermined by trial counsel's contrary account (*id.* at 37a-39a). The court likewise dismissed Fischl's request for an evidentiary hearing on the disputed issue and reasoned:

> [W]hether or not the agreed-upon trial strategy included using Kerkman to provide Fischl's defense is a clear-cut conflict in testimony between Fischl and his counsel. Fischl claims that such was the strategy; trial counsel says it wasn't. Fischl does not tell us what more an evidentiary hearing could possibly show.

(*Id.* at 37a-38a.) The court went on to declare that "Fischl's trial counsel presents the more objectively reasonable view" (*id.* at 39a)---i.e., that it was never the plan to rely on Kerkman's attorney to present a defense---in light of the "hostility and personal animus" that had concededly existed between the defendants at the start of the case (*id.* at 38a) and in light of the fact that Fischl's claim "was first made known to the world" in the instant collateral proceeding---commenced "some four years after Fischl's direct appeal failed"---thus in the court's view "rais[ing] a strong inference

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was therefore assigned to a different judge on the district court. *United States v. Kerkman*, *supra* (order filed June 29, 1993). That judge has evidently determined that Kerkman's claims raise disputed issues of material fact, since he has ordered an evidentiary hearing in that case. *United States v. Kerkman*, *supra* (order filed Feb. 16, 1994).

as to [its] invalidity" (*id.* at 35a-36a). Accordingly, the court concluded that "[t]he hearing was properly denied" (*id.* at 39a).

REASONS FOR GRANTING THE PETITION

The court of appeals frankly acknowledged that this case presents "a clear-cut conflict" (App. B, *infra*, 37a) between the accounts of witnesses to a material issue, but held that no evidentiary hearing was required to resolve that "conflict" and sustained the district court's decision to resolve it summarily against Fischl (*id.* at 37a-39a). We respectfully submit that this decision is impossible to square with the intention of Congress as expressed in the language of 28 U.S.C. § 2255 and interpreted by this Court in *Machibroda v. United States*, 368 U.S. 487 (1962); with the decisions of the other courts of appeals to address this important, recurring question; and with sound considerations of justice.

I. The Decision of the Court of Appeals Conflicts with the Intention of Congress as Expressed in the Language of 28 U.S.C. § 2255 and Interpreted by This Court in Machibroda v. United States, 368 U.S. 487 (1962), and Is Manifestly Unjust

In sustaining the district court's decision to resolve "a clear-cut conflict" (App. B, *infra*, 37a) between material witnesses without affording Fischl the benefit of an evidentiary hearing, the court disregarded the plain language of 28 U.S.C. § 2255. That provision states, in pertinent part:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to

> no relief, the court shall . . . grant a prompt hearing thereon . . . .

Plainly, the "motion and the files and records" in a § 2255 case do *not* "show"---let alone do they do so "conclusively"---that a defendant "is entitled to no relief" when what the record reveals is "a clear-cut conflict" (App. B, *infra*, 37a) between witnesses to a material issue. Indeed, this Court firmly established the statutory requirement of an evidentiary hearing in such circumstances in *Machibroda v. United States*, 368 U.S. 487 (1962), the pertinent facts of which are strikingly similar to those presented here.

In *Machibroda*, the defendant filed a motion for vacation of sentence under 28 U.S.C. § 2255, claiming, among other things, that his plea of guilty had been induced by misrepresentations assertedly made to him privately by the prosecutor. Specifically, defendant asserted that the prosecutor had promised him a sentence of not more than 20 years in exchange for the plea---and had further promised to move for a reduction of any sentence imposed in excess of 20 years---but had failed to make the promised motion when the trial judge sentenced defendant to 40 years imprisonment. 368 U.S. at 488, 489, 492 n.1. In response to defendant's claim, the Government submitted the sworn affidavit of the prosecutor in question, who conceded that he and the defendant had held a private conversation concerning the sentencing, but who "emphatically denied" the misrepresentations defendant had alleged. *Id.* at 491-92.

Notwithstanding the conflict between the accounts offered respectively by defendant and the prosecutor, the district court declined to hold a hearing, resolving the conflict instead on the basis of the sworn statements. *Id.* at 492. The court reasoned that defendant's failure to mention the alleged agreement in a letter he sent to the trial judge six months after

the sentencing---together with his failure to complain of the prosecutor's allegedly broken promise until two and a half years after the sentencing---"'conclusively indicates the falsity of the defendant's allegations.'" *Id.* at 492-93, 494 (citation omitted).

This Court reversed, concluding that the district court "did not proceed in conformity with the provisions of 28 U.S.C. § 2255, when it made findings on controverted issues of fact without notice to the petitioner and without a hearing." 368 U.S. at 494. The Court stressed that § 2255 by terms requires a finding that the "'motion and the files and records of the case conclusively show that the defendant is entitled to no relief.'" 368 U.S. at 494, quoting 28 U.S.C. § 2255. The Court rejected the suggestion that such a showing could *ever* be made in a case where the defendant's claims---and the opposing witness's response---"related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light." 368 U.S. at 494-95. Moreover, the Court reasoned, in such circumstances the trial judge was in no position conclusively to resolve the conflict "by drawing upon his own personal knowledge or recollection." *Id.* at 495. Finally, the Court rejected the suggestion that an evidentiary hearing would be "futile" because the only witnesses to the incident in question were the defendant and the prosecutor, noting that their respective accounts could be "corroborated or disproved" by a variety of forms of circumstantial evidence. *Id.* The Court concluded (*id.* (citation omitted; emphasis added)):

> "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and

> unbelievable cannot serve to deny him an opportunity to support them by evidence. *On this record it is his right to be heard.*"

So here. As in *Machibroda*, this case turns entirely on a question of fact as to which there is concededly "a clear-cut conflict" (App. B, *infra*, 37a) between the accounts of material witnesses. And as in *Machibroda*, the lower court resolved that "conflict" against defendant without holding an evidentiary hearing, finding the account offered by the Government's witness the more "objectively reasonable" (*id.* at 39a) of the two. But as in *Machibroda*, the events to which the witnesses' accounts relate occurred outside of the courtroom and of the presence of the trial judge, and accordingly neither the trial record nor the recollections of the judge could shed any "real light" on the dispute in question---let alone were they capable of resolving the issue "*conclusively*" against defendant's claims, as required by the plain language of § 2255. And as in *Machibroda*, the fact of the head-to-head conflict between two eyewitnesses---far from making an evidentiary hearing "futile"---makes such a hearing absolutely *vital* to fair and accurate determination of the truth.

The manifest injustice of a contrary rule is illustrated by its application to the present facts. As in *Machibroda*, there is extensive additional evidence through which Fischl's allegations could be "corroborated or disproved" (368 U.S. at 495) at an evidentiary hearing. Quite apart from the live testimony of Fischl and trial counsel, and the important opportunity directly to observe their demeanor and countenance, there are two *other* eyewitnesses to the meeting in which Fischl contends he was assured of a defense presented by Co-defendant Kerkman's attorney---a fact that is corroborated by trial counsel himself (see App. D, *infra*, 53a-

54a). Indeed, in this respect Fischl's case is even stronger than *Machibroda*, where the conversation at issue took place in the absence of other eyewitnesses. Accordingly, the court below was simply wrong when it suggested that there was nothing "more an evidentiary hearing could possibly show" (App. B, *infra*, 38a).

Nor is there any more reason here than in *Machibroda* to conclude that the nature of defendant's claim or his delay in making it "'conclusively indicates the falsity of the defendant's allegations'" (368 U.S. at 494 (citation omitted)). The court below reasoned that Fischl's assertion that he was expecting Co-defendant Kerkman's attorney to present a defense on his behalf was belied by the "hostility and personal animus" that had existed between the defendants as the trial commenced (App. B, *infra*, 38a). But that inference is fairly met by trial counsel's candid admissions that, by the close of the Government's case, "things [had] warmed up a little bit" between the defendants and that, in counsel's view, the "damage, frankly, had been done" by permitting Fischl's jury to hear the Government's case against Kerkman (App. D, *infra*, 52a-53a, 54a, 55a); and it is further undermined by the undisputed fact that counsel did not renew the severance motion at the close of the Government's proofs. The court's inference that Fischl's "delay" in bringing this collateral proceeding renders his claim suspect (App. B, *infra*, 35a-36a) is equally one-sided. That argument was made by the Government in its brief to the court of appeals (Gov't Br. 4), and we responded with a forceful showing that there were good and compelling reasons for the delay in question.[3] The conflict between the Government's inference--

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[3]As we stated in our reply brief at 4-5 (footnote omitted):

> [T]he Government describes our ineffective-assistance-of-counsel allegation as "tardy" (Gov't Br. 4) and asserts that "[b]elated claims of ineffective assistance, not raised when the opportunity first arises,

-which was summarily accepted by the court of appeals (App. B, *infra*, 35a-36a)---and the facts we alleged below confirms the existence of an additional disputed issue that could fairly and accurately be resolved only on the basis of the evidentiary hearing that Fischl was denied.

In sum, then, the decision below---which resolved the head-to-head conflict between Fischl and trial counsel without affording Fischl "his right to be heard" (368 U.S. at 495)---is utterly inconsistent with the reading of 28 U.S.C. § 2255 given by this Court in *Machibroda* and is manifestly

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raise a strong inference of their invalidity" (*id.* at 13-14). But this *is* Fischl's first legally available "opportunity" to press his claim, since he couldn't raise the issue on direct appeal (see *United States v. Gonzales*, 929 F.2d 213, 215 (6th Cir. 1991) (collecting cases)) and since this is his first and only motion under 28 U.S.C. § 2255. . . . Indeed, the present motion represents Fischl's first *practically* available "opportunity" to press his claim as well, a point that could be lost only on a government lawyer who doesn't have to worry about how he is going to pay for a decision to file a lawsuit. Simply put, the trial, conviction, and sentence in the underlying case have devastated Fischl, financially and otherwise. Among countless other consequences, he can no longer work in the profession for which he was trained. He has a son in college and a wife and five other children whom he must support. During the period since the disposition of his original appeal, Fischl has thus had essentially two alternatives: Indulge in the reckless futility of pressing a § 2255 motion *pro se*, or attempt to persuade a trained lawyer to represent him *pro bono*. As the record reflects, in the spring of 1991, Fischl finally succeeded in the latter course when the author of this brief, who is Fischl's first-cousin and is employed full-time as a professor of law, agreed to take on the case free of charge and in his "spare" time. In sum, the delay to which the Government points is a direct result of its own prosecution of Fischl; in the circumstances, its complaint concerning that delay is either an instance of breathtaking institutional arrogance or a sorry attempt at Kafkaesque irony.

unjust. Corrective action by this Court is therefore warranted.

II. The Decision of the Court of Appeals Conflicts with the Decisions of the Second, Third, Fifth, and Ninth Circuits with Respect to an Important, Recurring Issue in the Administration of 28 U.S.C. § 2255

As shown in the previous section, the issue raised by this case---the necessity of conducting an evidentiary hearing in § 2255 cases that present head-to-head conflicts between material witnesses---was firmly resolved by this Court in *Machibroda*. Not surprisingly, the other courts of appeals that have confronted that issue in *Machibroda*'s aftermath have strictly and uniformly adhered to the rule of that case. See, e.g., *United States v. Aiello*, 814 F.2d 109, 113-14 (2d Cir. 1987) (evidentiary hearing was required under *Machibroda* where sworn statements submitted by the parties "reveal sharp disputes" regarding material facts); *Del Piano v. United States*, 362 F.2d 931, 932-33 (3rd Cir. 1966) (evidentiary hearing was required under *Machibroda* where Government's affidavits denied defendant's allegations); *Friedman v. United States*, 588 F.2d 1010, 1014-17 (5th Cir. 1979) (same); *Crispo v. United States*, 443 F.2d 13, 14-15 (9th Cir. 1971) (same); see also *DeVincent v. United States*, 602 F.2d 1006, 1008-10 (1st Cir., 1979), cert. denied, 449 U.S. 1038 (1980) (evidentiary hearing was required under *Machibroda* where defendant's allegations, if true, would have entitled him to relief); see generally Wright, *Federal Practice and Procedure: Criminal 2d* § 599, at pp. 499-500 & n. 27 (1982), at p. 147 n.27 (1993 Supp.) (collecting cases requiring an evidentiary hearing where the Government's affidavits conflict with defendant's allegations).

The decision below therefore conflicts not only with *Machibroda*, but also with the settled law of the other circuits, warranting immediate corrective action by this Court. Cf. *Schiebelhut v. United States*, 357 F.2d 743, 747 (6th Cir. 1966), cert. denied, 387 U.S. 910 (1967) (Edwards, J. dissenting) (criticizing majority for sustaining dismissal of a § 2255 motion "by consideration of affidavits without a hearing in court with the right of cross-examination"). Moreover, this Court is well aware that § 2255 actions comprise a substantial segment of the workload of the federal courts. See, e.g., *Reports of the Proceedings of the Judicial Conference of the United States* 183 (table C-3) (1992) (revealing that 3,983 motions for vacation of sentence were filed in the federal district courts in fiscal year 1992). The standard for determining whether to grant an evidentiary hearing in such cases is accordingly of great and recurring importance both to the equitable administration of the statute and to the fair and efficient allocation of judicial resources. Nor is the importance of a conflict in the application of that standard substantially diminished by the fact that the opinion below is unpublished. It is doubtless the case that the vast majority of motions under § 2255 will be disposed of through unpublished decisions. Cf. *Reports of the Proceedings of the Judicial Conference*, *supra*, at 202 (table C-4) (revealing that 3,174 out of 3,197 motions for vacation of sentence were terminated "before pretrial" in fiscal year 1992). Accordingly, unless this Court acts decisively to correct such a serious departure from well-established statutory principles, the danger that decisional inconsistency will flourish in the unpublished decisions of the lower courts---undetected and hence unlikely to be remedied by congressional action---is clear and present.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1994

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. 1:84:CR:17-02
United States of America
v.
Robert D. Fischl

Opinion

Filed August 20, 1992

Before Richard A. Enslen, U.S. District Judge

This matter is before the Court on defendant's motion to vacate sentence pursuant to 28 U.S.C. § 2255 and defendant's motion that this Court should disqualify itself from any further consideration of this case, pursuant to 28 U.S.C. § 455.

Defendant bases his motion to vacate sentence upon four assertions: (1) there was incompetence of trial counsel that prejudiced defendant's case; (2) a due process violation occurred when the trial was severed mid-stream after the jury had already heard all of the evidence against co-defendant Charles Kerkman, therefore depriving the jury of hearing the evidence in Mr. Kerkman's defense; (3) a due process violation occurred when this Court allegedly misstated the record at sentencing; and (4) a due process violation occurred when the government failed to produce important evidence exculpating Fischl on the charge of mail fraud with respect to a letter sent to State Senator Joseph Mack.

Defendant also asserts that the evidence produced at trial was insufficient to support a conviction on any of the

counts and that the restitution that this Court ordered defendant to pay was contrary to law and, therefore, invalid.

Regarding the motion to disqualify, defendant offers two grounds. First, because I presided at the trial and participated in the meeting in my chambers concerning the possibility of a mid-trial severance of co-defendant, Charles Kerkman, defendant contends that I am a material witness to critical facts supporting Fischl's claim of incompetence of trial counsel, and, consequently, that I must recuse myself from this case, pursuant to 28 U.S.C. §455(b)(5)(iv). Second, defendant contends that because his claim that he was denied due process is founded on the allegation that this Court based defendant's sentence on a misreading and misstatement of record facts, this Court could not dispassionately make a determination on his claim.

FACTS

On January 30, 1984, defendant Robert Fischl and co-defendant Charles Kerkman were each charged with 11 counts in a 12-count indictment. Counts one through four charged both defendants with wire fraud. Counts five and six charged both defendants with mail fraud. Counts seven and eight charged both defendants with transporting in interstate commerce securities that had been taken by fraud. Count nine charged both defendants with conspiracy to commit mail fraud and wire fraud. Count ten charged Kerkman with submitting a false tax return, and Count eleven charged Fischl with submitting a false tax return. Count twelve charged both defendants with conspiracy to impede the Internal Revenue Service.

Defendants Fischl and Kerkman started two companies: Upper Peninsula Shipbuilding Company (UPSCO) and Lake Link Transportation, Inc. (LLTX). Kerkman was president of both companies and Fischl was

executive vice-president and treasurer of both companies.

The business venture involved building and operating integrated tug barges on the Great Lakes for purposes such as transporting railway cars across the lake more efficiently. LLTX was to operate the vessels. In June, 1979, the State of Michigan entered into a contract with UPSCO in which the latter would build a tug and four barges for $35,500,000. The contract contained several conditions, including that UPSCO was to provide information on its expenditures and its progress. Also, there was a cancellation clause in the contract if a conflict of interest arose regarding the arrangements made by UPSCO.

Although the contract with the state called for the first payment to UPSCO to be made in October, 1979, UPSCO requested a $1 million advance on that payment to be made in July, 1979. Fischl, in a letter to the state dated June 29, 1979, represented that a 20% down payment on engines for the tug would require $390,000 and that the remaining $610,000 would be used for working capital.

The actions involving the payment for the engines are at the center of this case. UPSCO contracted with a German engine manufacturer, Krupp MaK Maschinenbau, GmbH (MaK), for the engines needed on the tug being built for the state. The price and terms of this purchase changed over time. A letter signed by Kerkman from LLTX to Mr. Kuehl of MaK, dated June 6, 1979, indicated the price was DM 3,240,000 and that UPSCO would pay 10% down, subject to the state appropriating the funds for the purchase of the tug-barge system. The letter indicates that the remaining 90% would become due on delivery of the goods. Gunter Kuehl, the recipient of the letter, testified at trial that Fischl had actually typed the letter after the defendants and he had met and negotiated the terms of the contract with MaK. Mr. Kuehl called the letter a "letter of intent." The actual order for the engines was to be placed by Kerkman when he visited

Germany in late June, 1979.

According to the testimony of Mr. Kuehl, when Kerkman visited Germany in the summer of 1979, they first went through the technical details and then canceled certain items from the first offer and added certain items, some of them expensive, to make the offer complete. However, according to testimony from Mr. Kuehl, after MaK recalculated the price for its offer, Kerkman requested that MaK repay him for the service he gave to MaK in introducing MaK to the U. S. market, even though he had never asked for a commission for these services. Kerkman stated that he needed the money in order to have working capital for his business.

It is this payback that is at the root of all of the counts involved in the indictment. Although Mr. Kuehl did not recall how the revised down payment figure and commission figure were determined, the amounts create coincidences that were referenced by the government in its examination of Mr. Kuehl. The state noted that if the final price of DM 3,985,000 is reduced by the DM 425,000 paid as a commission or consulting fee to Kerkman, then the amount that remains is DM 3,560,000. Further, if the DM 781,000 down payment is reduced by the DM 425,000 paid back to Kerkman, the amount that remains is DM 356,000, which happens to be exactly 10% of the total price that remained after subtracting the commission that was paid back.

Mr. Kuehl, though still maintaining that he did not recall how the DM 781,000 down payment figure and the DM 425,000 commission figure were determined, agreed with the state that these figures could have been selected because the mathematics still provided MaK with a 10% down payment once the commission paid back to Kerkman was netted out.

Mr. Kuehl testified that the money paid from MaK to Kerkman would not have been paid to him had the engines

not been ordered from MaK. Further, he stated that the money would not be given to Kerkman until after MaK received the DM 781,000 down payment from UPSCO, which occurred on July 5, 1979.

The letter from Fischl to the state, dated June 29, 1979, stated that the down payment required on the engines was 20%. Mr. Kuehl testified that MaK did not specify these terms. Although the figures indicate that the down payment is exactly 10% when the commission paid to Kerkman is subtracted from the amounts due MaK, the figures also indicate that if no commission had been paid, then the DM 781,000 down payment would comprise just under 20% of the total price of DM 3,985,000.

The money paid back to LLTX was accompanied by a letter from MaK, stating that it was "[f]or sales consulting in the United States in 1978 through 30th June, 1979 . . . . " However, LLTX was not incorporated until April, 1979. The money paid back to Kerkman included a draft for DM 405,000 payable to LLTX, not Kerkman personally. Although the other draft from MaK, which was for DM 20,000, was payable to Kerkman, both drafts were transported across state lines by Fischl and deposited in an LLTX corporate account in a bank in Chicago.

Although the "commission" was allegedly earned by Kerkman and not LLTX, the money was deposited in the LLTX account and later entered as income on a LLTX tax return. It was Fischl who characterized the payment to LLTX as a "commission," according to the testimony of Mr. Camilli, who helped prepare the tax forms for LLTX. The "commission" was handled differently by MaK, which had included the commission in its figures related to the engine sales to UPSCO, not LLTX or Kerkman individually. Finally, the money was then spent on vessel design plans, thus relieving LLTX of any tax liability for the unearned funds.

Mr. Hoffman, who at the time was an employee of Ernst and Whinney, which audited UPSCO, prepared the handwritten text of a letter that MaK was to send back to Ernst and Whinney, verifying the terms and commitments involved in the engine purchase. The letter states that the down payment was DM 781,136 and mentions nothing about the money paid back to Kerkman. Mr. Hoffman testified that he used information from contractual documents to prepare the letter and that neither Fischl nor Kerkman ever told him that the Germans paid back DM 425,136 in relation to the engine purchase contract. Mr. Hoffman stated that it was possible that he had given the draft letter first to Fischl, who then gave it to someone else. The typed version of the letter was sent from MaK to Ernst and Whinney.

According to testimony from his aide, Andrew Such, State Senator Mack, who had helped UPSCO obtain the contract with the state and was involved in passing the appropriations for the project through the legislature, began hearing feedback from the Michigan Department of Transportation and other legislators indicating concern about Fischl and Kerkman and where they were getting financing. Mr. Such composed a letter to UPSCO that was signed by Senator Mack and dated November 20, 1979.

Mr. Such stated that he had probably reviewed the letter with Fischl and Kerkman prior to sending it to them. The letter asked about the total cost and deposit involved with the engine purchase. It asked if Kerkman was an agent for the engine manufacturer and, if so, whether he received a commission from the sale of the engines to UPSCO. It asked about financing, including whether the principals in UPSCO invested any of their personal money.

The response to Sen. Mack's inquiry was dated November 21, 1979, and apparently signed by Kerkman. This letter indicates that the deposit on the engines was 20% of the total cost and that the total cost of the engines was

$2,293,902. The letter stated that Kerkman would receive no commission on the sale of the engines to UPSCO. Mr. Such had talked with both Fischl and Kerkman about the letter, and neither ever told him that money was received back from the German company.

The actions by defendants related to the purchase of the engines and the payback made to Kerkman led to all of the counts that were charged in the indictment. The government charged that the money paid to Kerkman was obtained through defendant's scheme to defraud the State of Michigan. The wire fraud charges concerned communications to and from Germany, including the wiring of the down payment to MaK on July 5, 1979. One mail fraud charge concerned the letter sent to State Senator Mack to quiet his concerns. The other mail fraud charge concerned the letter that defendants allegedly caused MaK to send to Ernst and Whinney, which was auditing UPSCO expenditures with respect to the contract with the state.

The two charges of interstate transport of securities obtained by fraud concern the draft that MaK gave to Kerkman, Kerkman's transporting of the draft from Germany to Escanaba, and Fischl's transporting and depositing the draft in the bank in Chicago. The tax charges concern listing the DM 425,000 paid to Kerkman as income on the tax return filed for LLTX and signed by Fischl. Finally, the conspiracy charges relate to the allegation that the two defendants agreed to defraud government officials.

Prior to the start of the trial on August 20, 1984, Fischl twice moved this Court to sever his trial from Kerkman's trial. Each time, this Court denied the motions.

At the trial, a jury heard the government's case against both defendants on all counts of the indictment. After the close of the government's proofs on September 11, 1984, both defendants moved for a judgment of acquittal under Rule 29, claiming the proofs did not show a scheme to

defraud as a matter of law. Except for Count Ten against Kerkman, this Court denied the motion.

On September 13, 1984, Fischl rested without presenting any proofs. When Kerkman took the witness stand in his own defense, however, counsel for Fischl requested that Kerkman's testimony not be considered by the jury as evidence relating to Fischl's case.

The Court recessed to consider the matter and then requested a meeting with the government, the defendants and their attorneys. The Court asked counsel for Fischl if the earlier motion for severance of the cases was still on the table. Counsel responded, "Yes, your Honor." The case against Fischl was completed and Fischl had rested. Therefore, when counsel for Fischl objected to testimony by Kerkman being used in the case against his client, this Court, recognizing that the evidentiary portion of the trial as it related to Fischl was completed, granted the motion for severance.

The case against Fischl was submitted to the jury on September 18, 1984. The jury found that Fischl was "not guilty" on Counts One through Four (charging wire fraud) and on Count Seven (charging interstate transport from West Germany to Escanaba, Michigan, of the checks received by Kerkman from MaK). The jury found Fischl guilty of the remaining counts, including the mail fraud counts, the tax counts, the conspiracy count, and the count alleging transportation of the MaK payment from Escanaba, Michigan, to the bank in Chicago, Illinois.

Defendant Fischl was sentenced to one year imprisonment, five years probation, and was ordered to pay restitution of $232,719.45, which is the dollar value of the DM 425,136 that MaK paid back to Kerkman on the condition that UPSCO order engines from MaK and pay a down payment of DM 781,136. Defendant Kerkman was ultimately retried in 1986, after the Court declared a mistrial

with respect to the case against him.

Fischl moved for a judgment of acquittal and for a new trial, which this Court denied on March 29, 1985. On appeal, Fischl contended that he should have been tried separately from Kerkman and that he should have been acquitted because the kickback scheme was not intended to harm anyone, and the evidence, therefore, could not support a finding that Fischl had the requisite intent to defraud. The Sixth Circuit rejected these contentions and affirmed the conviction on July 30, 1986. United States v. Fischl, 797 F.2d 306 (6th Cir. 1986).

Shortly after he lost his appeal, defendant moved, pursuant to Rule 35, for a reduction in sentence, which this Court denied on May 7, 1987. However, at that time, this Court ordered that Fischl's restitution be reduced to $116,359.50, thereby splitting the restitution between Fischl and Kerkman, who had also been previously ordered to pay full restitution. Fischl brought his Section 2255 motion while he was still on probation with respect to the conviction in this case.

MOTION TO RECUSE

Bias:

Defendant Fischl has moved that this Court disqualify itself from further consideration of his case. Therefore, prior to giving any consideration to the issues involved in the motion to vacate sentence, I must determine whether I should recuse myself.

"Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might be questioned." 28 U.S.C. § 455(a). The judge "shall also disqualify himself [sic] in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts

concerning the proceeding." 28 U.S.C. § 455(b)(1).

The Sixth Circuit has held that a judge should recuse himself under Section 455 "only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Wheeler v. Southland Corp., 875 F.2d 1246, 1251 (6th Cir. 1989) (citing United States v. Story, 716 F.2d 1088, 1091 (6th Cir. 1983)). Furthermore, any bias or prejudice to mandate disqualification of the trial judge under Section 455 must either be personal bias arising out of the judge's background and associations, or it must come from an extrajudicial source "other than participation in the proceedings or prior contact with related cases." Id. (citing Demjanjuk v. Petrovsky 776 F.2d 571, 577 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986)).

Fischl's claim of bias arises out of statements made by this Court during sentencing. As part of this Court's many comments during that sentencing, the following statement was made:

> (I)t was unrebutted that Mr. Kerkman told Mr. Fischl if you don't get the money to me I don't get the commission . . . .

Also, I indicated to Fischl the Court's disappointment with his refusal to acknowledge he was told by Kerkman about the amount being paid back by MaK during the second phone call from Kerkman to Fischl in early July, 1979.

Fischl disagrees that the testimony of Mr. Kuehl, who was with Mr. Kerkman when the phone call was made, supported the statement by this Court. Further, Fischl contends that this Court should not make the determination of whether the statement made at sentencing was accurate or supported by the record, citing Halliday v. United States, 380 F.2d 270, 272-74 (1st Cir. 1967).

As noted by the government, Halliday is from the First Circuit and is not the controlling law for this Court. However, even if this Court were bound by the holding in Halliday, that case can readily be distinguished.

In Halliday, the district court, without making an inquiry as to voluntariness or defendant's understanding of the charges, found that the guilty plea of the defendant had been made voluntarily. Id. at 271-72. The defendant later challenged the finding in a Section 2255 proceeding. Id. at 271. The First Circuit determined that it was improper for the judge to take new evidence and review the correctness of his own determination.

In the present case, the Court was only commenting on the evidence which was presented at trial. The jury had already passed judgment on the facts and found Fischl guilty on six counts and not guilty on five other counts. Therefore, unlike the court in Halliday, this Court is not being asked to review the correctness of its own determination.

Furthermore, Fischl, for the most part, limits his evaluation of this Court's interpretation of the evidence to only the portion of Mr. Kuehl's testimony that referred directly to the statements made by Kerkman in the phone call to Fischl. However, this Court's comments were based upon all of the evidence presented and upon the verdict of the jury. For example, Fischl states that Mr. Kuehl never testified that Kerkman said the word "commission" in his conversation with Fischl. However, the payback to Mr. Kerkman was referred to by Mr. Kuehl and by the counsel questioning Mr. Kuehl as a "commission" throughout his testimony.

When this Court referred to the testimony as "unrebutted," all this meant was that no testimony was heard from any other witness to the conversation rebutting Mr. Kuehl's testimony.

Fischl notes several responses by Mr. Kuehl both during cross-examination and also during direct examination

in support of his contention that the testimony cannot be fairly characterized as I had suggested at sentencing. However, Fischl's position is in reality just a difference of opinion regarding the credibility of the various statements made by Mr. Kuehl. Mr. Kuehl did in fact testify that "to the best of [his] recollection, Mr. Kerkman told Mr. Fischl that he is taking back a check, that he has to wait for the down payment." Trial Transcript, at 1173. This statement, when combined with the evidence concerning Fischl's involvement in the engine purchase and the communications to auditors, the State, Senator Mack, and the I.R.S., certainly supports the interpretation that this Court gave at sentencing.

Fischl contends that because this Court's interpretation of the substance of the phone conversation between Kerkman and Fischl varies from the interpretation that Fischl asserts is warranted from the testimony, then this is evidence that this Court relied on extrajudicial sources. "Findings by a trial judge unsupported by the record are evidence that the judge has relied on extrajudicial sources in making such determinations indicating personal bias and prejudice." Peacock Records, Inc. v. Checker Records, Inc., 430 F.2d 85, 89 (7th Cir. 1970), cert. denied, 401 U.S. 975 (1971).

However, in Peacock, the Seventh Circuit found that there was no basis in the record for the trial judge's finding that defendants paid three witnesses to recant their prior testimony, as the only evidence in the record was that defendants had paid other witnesses to testify on their behalf. Id. As the appellate court noted, admissions that witnesses were paid to testify is considerably different than paying witnesses to admit to having committed perjury in their prior testimony. Id. In this case, there is considerable evidence to support this Court's comments on the evidence that were made at sentencing.

Furthermore, this Court's comments upon the content of the phone conversation between Kerkman and Fischl could hardly have come from an "extrajudicial source." There were apparently only three witnesses to the conversation, Mr. Kuehl and the two defendants. Only Mr. Kuehl testified about the conversation. I can assure Fischl that I had no ex parte communications with any of the witnesses to the conversations or with anyone else claiming to have information about the content of the conversation. Because my comments at Fischl's sentencing were interpretations based on evidence presented at trial, and were not from an "extrajudicial source," the prerequisite for recusal announced in Wheeler has not been satisfied.

For the foregoing reasons, I will issue an order denying defendant Fischl's motion that I disqualify myself from further involvement in this case due to bias or prejudice.

Necessary Witness In An Evidentiary Hearing:

Fischl also suggests that I should recuse myself because I was a witness to the events occurring at trial, and, most importantly, to the events that occurred during the meeting in chambers after Fischl's trial counsel had objected to the jury's consideration of Kerkman's testimony with respect to the case against Fischl. As Fischl indicates in his brief, "unpleasant as it might be for a judge to testify, we consider it far worse that he should be the trier of fact to determine his own credibility." Halliday, 380 F.2d at 273.

It is unclear why I would need to be a witness in an evidentiary hearing to events that occurred in a meeting in chambers that Fischl and his trial counsel attended. Certainly, there is little need for my testimony. I agree with Fischl that if I were to give testimony at an evidentiary hearing, it would be improper for me to also be the trier of fact at the hearing. However, as Fischl recognizes, "this possibility would not

disqualify [a judge] prior to the hearing, specifically from determining whether a hearing should be held." King v. United States, 576 F.2d 432 (2nd Cir. 1978) (citing Panico v. United States, 412 F.2d 1151, 1155-56 (2nd Cir. 1969)).

As indicated in King, unless I rule that an evidentiary hearing is necessary with respect to defendant Fischl's motion to vacate sentence, I need not consider whether I would need to recuse myself from presiding at that hearing. Therefore, I need not disqualify myself from consideration of Fischl's motion to vacate sentence.

MOTION TO VACATE SENTENCE

Concerning the motion to vacate sentence, pursuant to 28 U.S.C. § 2255, Fischl asserts four distinct issues, three concerning alleged violations of due process and one concerning the incompetence of trial counsel.

Section 2255 provides a right of action for defendant to challenge his sentence if defendant can demonstrate that "the sentence was imposed in violation of the Constitution or laws of the United States . . . . " 28 U.S.C. § 2255. A proceeding under section 2255 is "an independent inquiry into the validity of the conviction." United States v. Hayman, 342 U.S. 205 (1952). The guilt or innocence of a defendant is not at issue in a section 2255 proceeding, but rather the validity and fairness of the proceedings against him. United States v. Kastenbaum, 613 F.2d 86, 89, (5th Cir. 1980); Payton v. United States, 436 F.2d 575 (10th Cir. 1970).

In most cases, an error of law does not form the basis for collateral attack unless the alleged error is "a fundamental defect which inherently results in a complete miscarriage of justice." Hill v. United States, 368 U.S. 424, 428 (1962). Therefore, section 2255 extends primarily to those issues that are of constitutional or jurisdictional magnitude, and any purported error not of such magnitude may only be

considered if it could not have been raised on direct appeal, and, if condoned, would result in a complete miscarriage of justice. United States v. Shaid, 916 F.2d 984, 987 (5th Cir. 1990).

Fischl contends that the record itself supports granting his motion to vacate sentence. In the alternative, Fischl requests that this Court conduct a hearing so that he may present the evidence that he could have presented had his trial counsel not rested following the government's presentation of its case against both Fischl and Kerkman. Also, Fischl suggests that a hearing may be needed to put into the record the events that occurred in the meeting held in chambers prior to this Court's granting of his motion to sever the proceedings. It is at this hearing that Fischl suggests that I may have to testify and, therefore, not preside.

Section 2255 requires the Court to conduct a prompt hearing in order to clarify the issues and make findings of fact and conclusions of law, "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. The Sixth Circuit requires a hearing on a section 2255 motion if "'there are factual issues in dispute and an insufficient record upon which to resolve. . . . [a] legitimate claim[] . . . .'" Paprocki v. Foltz, 869 F.2d 281, 287 (6th Cir. 1989) (quoting Alcorn v. Smith, 781 F.2d 58, 60 (6th Cir. 1986). The district court judge who presided at trial and sentenced defendant may rely on recollections of the case in ruling on a motion to vacate pursuant to section 2255. United States v. Polselli, 747 F.2d 356, 358 (6th Cir. 1984) (citing Machibroda v. United States, 368 U.S. 487, 494-95 (1962)); Friedman v. United States, 588 F.2d 1010, 1015 n. 7 (5th Cir. 1979), cert. denied, 469 U.S. 1196 (1985). Upon review of defendant's motion and the case files, and pursuant to my recollections of the proceedings in this case, I find that defendant's section 2255 motion is clearly without merit and that an evidentiary

hearing is not required.

Mid-Trial Severance:

Fischl asserts that a violation of his Constitutional right to due process resulted from the Court's severance of Kerkman's case after the government's proofs against both Kerkman and Fischl had been presented and after Fischl had rested rather than putting in evidence in his own defense.

This contention is without merit. Although Fischl suggests that the severance was in reality a sua sponte motion by this Court which his attorney acquiesced in, this is simply an inaccurate representation. First, the motion to sever the two cases was made by Fischl's attorney. Second, after Kerkman began testifying in his own defense, Fischl's attorney objected to that testimony being considered by the jury relative to Fischl's case. Given that the government's case against Fischl was completed and that Fischl had rested, I saw no basis admitting any further evidence in the case against Fischl. Therefore, in the meeting in chambers, I asked Fischl's counsel if the motion for severance was still in front of me. Counsel responded that it was. Therefore, I granted the motion.

Fischl's arguments on whether severance was wise after the government had already presented its evidence against Mr. Kerkman is more properly considered in making a determination regarding whether he received ineffective assistance of trial counsel. That argument will be addressed in due course. With respect to the due process argument, the record is clear: the case as it related to Fischl was completed at the time of the severance of the case against co-defendant. This severance was not sua sponte, but was granted with respect to a motion that was still in front of the Court, as confirmed by Fischl's counsel.

Statements During Sentencing By This Court:

Fischl contends that this Court's comments during sentencing, alleged to be a misreading of the record, also violates his rights to due process.

This question was discussed above in relation to Fischl's motion requesting that I recuse myself because of an alleged bias or prejudice against him. As noted, my comments reflected my interpretation given the totality of the evidence against Fischl. The sentence was within the law. The government is correct in its statement that Fischl's apparent disagreement with the interpretation of the evidence given by this Court does not rise to a Constitutional violation requiring vacation of his sentence. Fischl's contention that my comments at sentencing violated his rights to due process are without merit.

Failure By The Government To Produce Evidence Exculpating Fischl:

Fischl suggests that because the government did not produce evidence in its possession, which he contends exculpates him on the mail fraud charge concerning the letter sent to Senator Mack, his due process rights were violated.

Fischl claims that the government had in its possession travel reports concerning Fischl which were produced in response to a subpoena for the grand jury proceeding. Fischl claims that these reports establish that he was not in Escanaba, Michigan, when the letter to Senator Mack, which was the basis for one of the mail fraud charges, was written. Also, Fischl claims that the travel records indicate that he was not in Milwaukee, Wisconsin, when the letter was mailed. The letter was postmarked as having been sent from Milwaukee.[1]

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[1] Fischl claims in his brief that the envelope containing Senator Mack's

The government is required give a defendant access to records which may be exculpatory. Brady v. Maryland, 373 U.S. 83 (1963). Evidence that exculpates a defendant if it is produced at trial would be expected to be introduced during defendant's presentation of his case. The government is not required to present exculpatory evidence while presenting its case against a defendant at trial. The records of travel vouchers were accessible by Fischl during and prior to the trial. Fischl does not contest the government's assertion in its brief that he had inspected the grand jury material during pretrial discovery and had access to them during trial.

Fischl does not claim that the government denied him access to these reports for introduction by him at trial. Perhaps the failure of Fischl's trial counsel to introduce the travel records is supporting evidence to Fischl's claim that he received ineffective assistance of counsel, but the specific complaint that the government did not produce the travel records at trial is insufficient to sustain his claim that his due process rights were violated.

Ineffective Assistance of Counsel:

Fischl's primary contention in his motion to vacate his sentence is that he failed to receive effective assistance of counsel at trial. Fischl complains that his counsel at trial, Robert Daavettila, agreed to the mid-trial severance without consulting with him about the consequences. Fischl further complains that his counsel failed to move to re-open the case and provide an affirmative defense after the motion for

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letter was not produced at trial. This contention is erroneous. The government, in referring to Exhibit 0-1, noted that the postmark on the letter was from Milwaukee, specifically from Escanaba. This Court examined the exhibit and specifically acknowledged that it was postmarked as having been sent from Milwaukee. Trial Transcript at 1558.

severance was granted.

To establish an ineffective assistance of counsel claim, defendant must satisfy the two-part test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). First, the movant must show that his "counsel's representation fell below an objective standard of reasonableness." Id. at 688. Second, the movant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. In sum, a criminal defendant "must show both that his counsel's performance was deficient and that it prejudiced his defense." Chandler v. Jones, 813 F.2d 773, 781 (6th Cir. 1987).

The Sixth Circuit has also said that the "defendant must make an affirmative showing not only that counsel failed to perform at least as well as a lawyer with ordinary training and skill in criminal law, a reasonable performance test, but also that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a proper result." United States v. Bavers, 787 F.2d 1022, 1030 (6th Cir. 1985). "If . . . action that appears from hindsight was taken for reasons that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective." Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) (citing McMann v. Richardson, 397 U.S. 759 (1970)).

The Supreme Court has stated that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the

> evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Strickland, 466 U.S. at 689.

Fischl suggests that this Court may need to conduct an evidentiary hearing in order to determine the merits of the arguments brought in favor of his motion. However, this Court finds that the evidence from the trial together with the excerpts from the deposition of Robert Daavettila, Fischl's trial attorney, as provided in the Appendix supplied to this Court by Fischl, will suffice to render a decision on this matter.

The first decision that Fischl questions is his counsel's statement to the Court that the motion for severance was still in front of the Court. Fischl suggests that there may need to be a hearing concerning the events that occurred at the meeting in chambers regarding the mid-trial severance. However, the government does not seem to dispute the description of the meeting that Fischl included in his brief. In short, Fischl states that when his counsel was asked by this Court whether the motion to sever was "still on the table," his counsel responded, "yes, your Honor," without consulting with Fischl.

Trial counsel's decision to object to the jury's use of Kerkman's testimony with respect to Fischl, and his decision to keep alive his motion for severance of the case concerning Kerkman, must be considered in light of the situation at the time.

According to the deposition of Robert Daavettila, taken on January 20, 1992, he believed that the "government had [not] made out a case that established Fischl's guilt

beyond a reasonable doubt." Deposition Transcript at 10. He did not believe that the government had established that Robert Fischl was aware of the alleged illegal nature of the payment made to Kerkman and that the testimony of Mr. Kuehl left "plenty of doubt with regard to the nature of that payment and what it was really for, and certainly the tie-in to Robert Fischl was, I thought, extremely tenuous at best." Deposition Transcript at 10.

In his reply brief on the matter now at issue, Fischl gives a 100 percent endorsement of his trial counsel's evaluation of the case at the close of the government's proofs. "[W]e quite agree with Daavettila that no rational trier of fact could have found proof of guilt beyond reasonable doubt on the basis of the shoddy case the Government presented at trial. . . ." Fischl's Reply Brief at 2.

Fischl's trial counsel considered Kerkman to be "a sort of unpredictable character." He indicated that he was "leary about what he might say on the tax issues." He indicated that he was not concerned about Kerkman's testimony on the nature of the payment because he "didn't think Kerkman could hurt us without hurting himself in a big way." Deposition Transcript at 15. Fischl's trial counsel "thought that if Kerkman kept his head, Kerkman could be a very effective witness. But Kerkman, I thought, had a short fuse . . . ."

Fischl's attorney was "not uncomfortable with Kerkman taking the stand, except, as I mentioned before, with regard to the volatile personality that Mr. Kerkman has." Deposition Transcript at 22. He felt that Kerkman's position, that Kerkman was not the business brains of this association and that any questions about finances belonged to Fischl, was "a negative insofar certainly as the tax counts were concerned, and maybe to some extent with relation to the other counts as well." Deposition Transcript at 37. Also, with respect to the testimony that Kerkman had given prior to

the severance, Fischl's attorney "felt an almost perceptible chill in the courtroom after [poster size exhibits of telexes that Kerkman had sent to Germany were introduced by the government and] admitted into evidence."

Fischl's trial attorney stated that his reason for responding to this Court that the motion to sever was still on the table was in order to protect the record and prevent any suggestion that he had waived his objection to Fischl being tried jointly with Kerkman. Deposition Transcript at 32. As Fischl indicated in his brief, this was the reason that counsel related to him during the short period between the meeting in chambers and the resumption of the trial. What Fischl failed to mention in his brief was that during that conversation, his counsel also told him that "the government really had not presented a convincing case for his guilt."

Viewing the situation as it stood at the time of the decision to sever Kerkman's case, his trial counsel's decision to agree to the severance was within an "objective standard of reasonableness." Even Fischl's current appellate counsel agrees that the government's proofs appeared to be insufficient to support a conviction. Part of this evaluation was founded upon the asserted failure to link Fischl with a knowledge of the nature of the payment made to Kerkman from MaK and the failure to prove that he had an intent to defraud the state.

Trial counsel believed that the case was won for his client at the close of the government's proofs and at the time of the meeting on whether to sever Kerkman's case. Fischl and his appellate counsel concur with this evaluation of the situation. If trial counsel had responded to this Court that the motion to sever was no longer on the table, then further testimony may have been given that could have hurt the case against his client. At his deposition, Fischl's trial counsel acknowledged that he was concerned that Kerkman had a "volatile personality" and that Kerkman's position that Fischl

was the financial brains behind UPSCO could hurt regarding the tax counts, and maybe the other counts as well.

Trial counsel felt a chill in the air when the telex exhibits were admitted into evidence during Kerkman's testimony. This event indicates his worry that Kerkman's testimony could hurt his client. Because the government could bring in evidence to impeach Kerkman's credibility and cross-examine him, Kerkman's testimony easily could have hurt his client's case -- a case that even Fischl's present appellate counsel considered to be a likely acquittal.

Kerkman, unlike Fischl, had to testify "because the evidence concerning among other things the transaction so central to the case was considerably stronger." Fischl's Brief at 8. Unlike Kerkman, "the evidence connecting Fischl in any way to that transaction was, to put it generously, razor thin." Fischl's Brief at 8. In a situation where the case is considered won, it was reasonable to avoid the possibility that testimony may come in during Kerkman's attempt to defend himself that could fill in the assertedly "shoddy case" presented by the government. Kerkman might have filled in with greater detail the substance of his phone conversation with Fischl, which present counsel believes was so incomplete as to preclude a finding that Fischl knew the nature of the money paid to Kerkman from MaK.

After a retrial of Kerkman subsequent to Fischl's trial, Kerkman was convicted of many of the same counts as were charged against Fischl. Further, Kerkman was convicted on Counts 4 and 7, on which Fischl was acquitted. Count 4 involved Fischl's wiring of the down payment to Germany, out of which the payment to Kerkman was made. Given this outcome, trial counsel's affirming that the motion for severance was still on the table seems quite reasonable and does not meet the test in Strickland for ineffective assistance of counsel.

Fischl also claims that his trial counsel's decision to rest following the close of the government's proofs was an error rising to the level of ineffective assistance of counsel, particularly when the attorney failed to move to re-open Fischl's defense following the severance of Kerkman's case.

Much of the discussion above regarding severance applies here as well. Fischl claims that he could have provided considerable evidence in his defense. However, as a trial strategy, that may not have seemed to be the best route to a successful defense at the time. Fischl and his counsel had decided that it would be best if he did not testify. This Court can only speculate as to the reasons for that decision. However, no speculation is needed regarding the opinion of trial counsel and Fischl, himself, that the government's case was incomplete and lacking in specifics. Furthermore, by resting, Fischl avoided having any evidence presented to the jury that the government might have used to impeach his credibility.

It is undoubtedly true that Fischl could have provided considerable detail to the body of evidence that he considered to be so sketchy and insufficient to convict. However, the fact is that the defense chose to rest precisely because the evidence was allegedly so incomplete and ambiguous that acquittal seemed assured.

Fischl claims that it had always been the defense's plan to rest and then rely on Kerkman's defense. Fischl claims that, given this alleged plan of attack, resting after Kerkman was severed from the case amounted to an indefensible decision on the part of his trial counsel. Fischl's trial counsel flatly denies that it was ever the plan to rely on Kerkman to defend Fischl. Deposition Transcript at 15.

Relying on Kerkman for a defense would have been a risky trial strategy, at least to this Court's thinking, and would constitute representation far more suspect under Strickland than resting. Trial counsel felt that the government had failed

to prove knowledge and intent on the part of Fischl, partly because of a lack of specificity. Kerkman could have provided specifics. Also, the jury may have disbelieved Kerkman, given his admittedly volatile nature, and used that disbelief against Fischl. Finally, Kerkman's position at trial was that Fischl was the financial brains of the company, not him. Therefore, it might well have been irrational to have wanted Kerkman to provide the defense to Fischl, especially, when at the close of the government's proofs, the case looked so favorable to the defense.

It is not unusual to choose not to present a defense after the close of the prosecution's case when either that case is considered weak or the risks in providing a defense are greater than their likely benefit. In United States v. Cowart, 590 F.2d 603 (5th Cir. 1979), the defendant charged with failure to file income tax returns presented no evidence and called no witnesses. Counsel for the defense decided that it was best to rest and avoid having certain impeachment exhibits revealed to the jury. The Fifth Circuit upheld the conviction in that case against a claim of ineffective assistance of counsel, concluding that it was not ineffective assistance of counsel to fail to put on evidence, given the factual situation and circumstances. Id. at 604.

The situation in this case is similar to that in Cowart, as well as many other cases where defendants decide it is in their best interest to remain silent when the government's proofs are considered to be insufficient to convict. Often, these defendants find that they have been convicted and, through hindsight, conclude that the decision not to present a defense was unwise. However, the reasonableness of the decision must be viewed within the context in which it was made. In this case, given that even current counsel for Fischl believes that the government's proofs fell far short of what assertedly should have been needed to find guilt, the decision to rest, rather than risk the possibility of altering that balance,

seems quite reasonable.

The representation that Robert Daavettila provided to Fischl at trial was well within the "wide range of reasonable professional assistance," as required by Strickland, 466 U.S. at 689. Therefore, the motion to vacate sentence based upon ineffective assistance of counsel must fail.

Other Issues:

Finally, Fischl raises two additional claims. He suggests that the evidence was insufficient to convict him of certain of the violations. He also suggests that the restitution this Court ordered was invalid, in that it was contrary to law.

In a section 2255 motion, a movant may not raise claims that were not presented on direct appeal unless he or she can show cause excusing the failure to raise the issues previously and actual prejudice resulting from the errors. 8c J. Moore, Moore's Federal Practice § 15.04[3] (rev. ed. 1992); Cross v. United States, 893 F.2d 1287, 1289 (11th Cir. 1990); Theodorou v. United States, 887 F.2d 1336, 1339 (7th Cir. 1989).

This rule does not apply to ineffective assistance of counsel claims because "there has not been an opportunity to develop and include in the record evidence bearing on the merits of the obligations." United States v. Wunder, 919 F.2d 34, 37 (6th Cir. 1990). However, the contentions concerning the sufficiency of evidence and the illegality of the ordered restitution are claims unrelated to the claim of ineffective assistance of counsel.

"[A]ny purported error not of [constitutional or jurisdictional] magnitude may only be considered under a section 2255 motion if it could not have been raised on direct appeal and, if condoned, would result in a complete miscarriage of justice." Shaid, 916 F.2d at 987.

Fischl appealed his case to the Sixth Circuit and his conviction and sentence were affirmed. He apparently failed to raise the issues that he now asserts in his section 2255 motion. Fischl provides no explanation for why these issues were not raised at the time of his direct appeal. Therefore, Fischl has failed to meet the cause and prejudice test. While the government provides convincing responses to the arguments raised by Fischl, this Court finds it unnecessary to pass on the merits of the arguments regarding these issues.

CONCLUSION

For the foregoing reasons, a judgment will be entered denying defendant Fischl's motion for disqualification of this Court and denying defendant Fischl's motion to vacate sentence.

/s/Richard A. Enslen
RICHARD A. ENSLEN
U. S. District Judge,
DATED in Kalamazo, MI: Aug. 20, 1992

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-2092
Robert D. Fischl
v.
United States of America

Opinion

Filed October 25, 1993

Before: MERRITT, Chief Judge; JONES and NELSON, Circuit Judges.

MERRITT, Chief Judge. Petitioner-Appellant Robert D. Fischl appeals the district court's denial of his Motion to Vacate Sentence under 28 U.S.C. § 2255 and his Motion to Disqualify the Honorable Richard A. Enslen from considering his case pursuant to 28 U.S.C. § 455. Fischl raises a host of arguments from ineffective assistance of counsel to insufficiency of the evidence. We find none of them persuasive and affirm the district court in all respects.

I.

The factual background of this case is somewhat complex. It is set forth in detail in the published opinion adjudicating Fischl's direct appeal, *United States v. Fischl*, 797 F.2d 306 (6th Cir. 1986) *(Fischl I)*; we summarize here for the sake of brevity. In 1979, Fischl and Charles H. Kerkman organized two thinly capitalized corporations, Lake link Transportation Company ("Lake Link") and Upper

Peninsula Shipbuilding Company ("UPSCO"). They negotiated a $35.5 million contract with the Michigan Department of Transportation ("Department") for the construction by UPSCO of a tug boat and four barges. That contract called for an advance of $3.5 million by October 1, 1979. As part of that advance, the Department agreed to deliver a check payable to UPSCO in the amount of $1 million on July 3, 1979 (the day the contract was to be signed) to be "used for the down payment on engines for the tugboat and for general administrative expenses of the shipyard." The contract contained a conflict-of-interest clause that prohibited UPSCO from entering into any contract or subcontract "in which any member, officer, or employee of [UPSCO] during their tenure or for one (1) year thereafter has any interest, direct or indirect." The contract also contained a termination clause giving the Department the right to terminate the contract in the event of a substantial violation of any term of the contract. The Department's initial $3.5 million advance payment was contingent upon UPSCO's providing the Department with "details of . . . direct or indirect construction expenditures and commitments made through the approximate date of the advance payments." UPSCO also was required to support these details "by sufficient documentation to demonstrate that actual expenditures and commitments are, at least, equal to the amount of the advance."

On June 29, 1979, Fischl gave the Department a letter requesting the $1 million advance, along with a purported quote from MaK Machinenbau ("MaK"), a German manufacturer of boat engines, claiming that MaK needed a 20% down payment for the engines it would manufacture for the project. That quote apparently was a forgery, since MaK's original quote requested only a 10% down payment.

Meanwhile, Kerkman flew to West Germany to close the deal for the engines with MaK. During these

negotiations, Kerkman solicited money from Gaunter Kuehl, a representative of MaK, to fund the fledgling Lake Link and UPSCO. Kuehl agreed to give Kerkman 425,136 Deutschmarks ("DM") and to add this amount to the engine order. Thus, the final "purchase price" of the engines was 3,985,136 DM, which included the 425,136 DM requested by Kerkman.

The parties signed the contract and the Department advanced the $1 million as planned. Of the $1 million received, Fischl transferred 781,136 DM ($428,250, 19.6% of the "purchase price") to MaK as a "down payment." MaK then issued two checks totaling the 425,136 DM requested by Kerkman; both checks were eventually deposited into Lake Link accounts. Most of this money was eventually used to purchase vessel drawings for Lake Link and UPSCO. The plans were a valuable asset which Kerkman and Fischl's young companies needed for this and future ventures.

Before the Department paid the remaining $2.5 million of the advance payment, it requested from UPSCO a brief outline of expenditures incurred. UPSCO submitted a "schedule of expenditures" on which $428,250 (781,136 DM) was listed as "direct expenditures" for "engines." This document also included a letter from MaK to UPSCO auditors that confirmed that UPSCO had a contract for the purchase of engines at a total price of $2,253,897.81 on which MaK had received a down payment of $428,257.81 (19.0% of $2,253,897.81). The text of the letter had been furnished to MaK by Fischl. The net down payment retained by MaK was in fact less than half the amount claimed in the letter, and the true price of the engines to UPSCO was approximately $233,000 less than the amount asserted.

The Department, not satisfied with UPSCO's outline of expenditures, conducted its own audit. The auditor concluded that UPSCO's expenditures had exceeded $1 million and found no unusual payments made by UPSCO.

However, Fischl did not tell the auditors that any money had been kicked back from MaK. Following the audit, the state paid UPSCO the remaining $2.5 million. After spending approximately $40 million of the State of Michigan's money, UPSCO went bankrupt, never having completed the tug boat or a single barge.

On January 30, 1984, Fischl and Kerkman were indicted in the United States District Court for the Western District of Michigan in a twelve-count Indictment. Counts One, Two, Three and Four charged both defendants with wire fraud; Counts Five and Six charged defendants with mail fraud; Counts Seven and Eight charged both defendants with knowing transportation in foreign and interstate commerce of checks which had been taken by fraud; Count Nine charged both defendants with conspiracy to commit mail and wire fraud; Count Ten charged Kerkman with submitting a false income tax return; Count Eleven charged Fischl with submitting a false tax return; and Count Twelve charged both defendants with conspiracy to impede the functioning of the IRS.

After indictment and before trial, Fischl moved to sever his trial from that of Kerkman. His motion was denied. On the first day of trial, August 20, 1984, he renewed his motion to sever. His motion was again denied. From August 22, 1984 to September 11, 1984, a jury heard the government's evidence against both Fischl and Kerkman. At the close of the government's proofs, both defendants moved for judgments of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. The district court denied the motions except for Kerkman's motion as to Count Ten, which was granted.

Then, apparently by a flip of the coin, it was determined that Fischl would present his defense first. Counsel for Fischl then stated, "Your Honor, pursuant to my advice and recommendation, Mr. Fischl has elected to rest

with the record being what it is. We will not put in any evidence." J.A. at 878. The case was thus closed as to *United States v. Fischl*. *See id.* at 879.

Kerkman then began to testify in his own defense. Before he got very far, however, trial counsel for Fischl raised the concern that "the jury should not consider this evidence as it relates to Mr. Fischl." *Id.* at 883. A recess was then called, during which counsel for both sides spoke with the trial judge in chambers. Fischl, who was in attendance, filed an affidavit stating his account of what happened:

> . . . [T]he Court then advised us that he had located fourteen cases that "support bifurcation at this juncture;"
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> . . . [T]he Court then asked Mr. Daavetilla [counsel for Fischl] whether his motion for severance was "still on the table;"
>
> . . .Mr. Daavetilla, who was sitting in a chair in front of me, immediately stood up, half-way, with his right arm and hand raised and his back to me, and said, "Yes, your Honor."
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> . . . [A]s we re-entered the court room, I asked Mr. Daavetilla what "bifurcation" meant, and asked the import of what had just happened;
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> ... [H]e then advised me that the Court had granted our severance motion. I then asked him why we wanted a severance at this late date, and he told me that he was afraid that if he did not accept the Court's offer, I would waive any future right to raise on appeal the Court's failure to grant severance .... I expressed my concern for his decision not to put on

> any defense, and he told me, "Don't worry about it, it won't hurt you. They don't have a case."

Id. at 175-1 [sic]. Thus on that same day, September 18, 1984, the district court decided to submit Fischl's case to the jury without any more testimony being heard in *United States v. Kerkman.*

The jury convicted Fischl on Counts Five, Six, Eight, Nine, Eleven and Twelve, and found him not guilty with respect to the remaining counts. He was sentenced on November 20, 1984. The district court sentenced him to one year of imprisonment on Counts Five, Six, Eleven and Twelve (to run concurrently); five years of probation, a fine of $10,000, and restitution in the amount of $232,719.45 (the amount of the aforementioned kickback) on Count Eight; and five years of probation (to run concurrently with the sentence imposed on Count Eight) on Count Nine. Fischl directly appealed. In *Fischl I,* we affirmed the convictions July 30, 1986.

Fischl filed a Motion to Vacate Sentence and a Motion to Disqualify the Honorable Richard A. Enslen in the United States District Court for the Western District of Michigan on January 30, 1991. Fischl was no longer in prison but was serving the last few weeks of his five-year probationary term. (At present, Fischl is no longer on probation and is not in custody.) The district court denied both motions without a hearing on August 20, 1992.

II.

Fischl raises numerous arguments on appeal. He claims he received ineffective assistance of counsel at trial which prejudiced his case, and that the district court erred by ruling on this issue without an evidentiary hearing. He contends-he was denied due process when his case was

severed from Kerkman's on the first day of Kerkman's defense, and that a hearing was required on this issue as well. He asserts that the prosecutor knowingly used false testimony at trial, tainting evidence essential for his conviction, and that his counsel's failure to recognize and raise this issue supports his claim of ineffective assistance. Fischl further contends that the restitution order entered against him is *ultra vires*, that the sentencing court relied on a misreading of trial testimony, and that the district court should be disqualified from any further consideration in this case. We reject each of these arguments.

A. Ineffective Assistance of Counsel

On appeal, the district court's determination of a claim of ineffective assistance of counsel is reviewed as a mixed fact-law question. Thus:

> The ... court's findings as to what was done or not done, and under what circumstances, are entitled to a presumption of correctness. On the other hand, the conclusion to be drawn from that conduct regarding the effectiveness of counsel's assistance is legal in nature. . . . [B]ecause it is legal in nature, the ... court's determination that [the defendant] received effective assistance is open to our review... limited only by the presumption of accuracy we must accord to its underlying factual findings.

Adams v. Jago, 703 F.2d 978, 980 (6th Cir. 1983) (Section 2254 proceeding); *see also Strickland v. Washington*, 466 U.S. 668, 698 (1984) (holding ineffective assistance of counsel to be a mixed fact-law question and noting that factual findings of federal district courts on this score are subject to clearly erroneous standard of review).

Under the well-known, two-part test for evaluating a Sixth Amendment ineffective assistance of counsel claim put forth in *Strickland*, 466 U.S. at 687, a criminal defendant "must show both that his counsel's performance was deficient and that it prejudiced his defense." *Chandler v. Jones*, 813 F.2d 773, 781 (6th Cir. 1987). Fischl claims that he agreed with trial counsel not to put on evidence after the government rested only on the assumption that Kerkman would testify and would aid his defense thereby. When, subsequent to resting and before Kerkman testified to anything material, Fischl's trial counsel acquiesced in (or reasserted the motion for) a severance and Fischl's case was sent to the jury, Fischl's assumption was not borne out in fact. Fischl essentially claims that trial counsel erred by not following through with the trial strategy depicted above, by not consulting him before acquiescing in (or reasserting the motion for) a severance, *see Strickland*, 466 U.S. at 688 ("From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."), by not pursuing strategic alternatives to a severance, and by failing to attempt to reopen the case after severance.

The district court judge (the same judge who tried the case initially) reviewed the relevant record and concluded that trial counsel's actions fell well within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In the district court's view, Fischl's Sixth Amendment claim failed to meet the first prong of the *Strickland* test. The alleged trial strategy of resting and relying on Kerkman for Fischl's defense was first made known to the world by Fischl some four years after Fischl's direct appeal failed. *Cf. Malone v. United States*, 299 F.2d 254, 256 (6th Cir. 1962) (significant period of time between when a potential Section

2255 claim should have become known and when the claim is actually brought "raises a strong inference as to [its] invalidity"), *cert. denied*, 371 U.S. 863 (1962). Thereafter, trial counsel for Fischl was deposed and trial strategy was reviewed. Trial counsel claimed that the decision to rest without presenting evidence was discussed with Fischl and that Fischl himself made the decision not to testify and to rest. *See* J.A. at 455. In trial counsel's view, the government had put on a weak case and might have been "sandbagging" harmful evidence for rebuttal. Significantly, trial counsel also claimed that the trial strategy *never* was to rely on Kerkman to present Fischl's defense. Kerkman, in trial counsel's view, was too volatile and explosive a witness, and there was too much bad blood between Kerkman and Fischl going into trial to count on Kerkman for assistance. Trial counsel thought that even an unemotional Kerkman might give testimony harmful to Fischl on the tax charges. In short, trial counsel "was not relying on ... Mr. Kerkman to carry the ball for Bob Fischl." *Id.* at 457. This was, according to trial counsel, all discussed with Fischl. *See id.* at 458.

We agree with the district court. Trial counsel's decision to rest was reasonable, given the view that the government presented a weak case[2] and that the government might be "sandbagging." By Fischl's own affidavit, his counsel informed him of this assessment before the trial resumed in court following the conference in chambers. There was no consultation problem concerning the decision to rest without presenting a defense.

The decision to sever after resting also was reasonable given the anticipated damage that Kerkman could have done to Fischl's case. Fischl argues that his counsel had a duty to

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2 Fischl himself "quite agree[d] with [trial counsel] that no rational trier of fact could have found proof of guilt beyond a reasonable doubt on the basis of the shoddy case the Government presented at trial." J.A. at 218-19.

consult with him on this issue. Fischl did talk to trial counsel, however, before the district court announced on the record that it would "now in part grant [the] motion" to sever. J.A. at 891.

If Fischl really did not want to sever midstream, he could have instructed trial counsel to withdraw the motion to sever or object if the district court decided to sever anyway. Fischl cites no authority for the proposition that, in this case, trial counsel was ineffective by not adequately consulting with him before agreeing to sever midstream. Furthermore, Fischl's belated assertion that, all along, he was relying on Kerkman for his own defense is so tenuous that his claim of ineffective assistance on grounds of lack of consultation before "abandoning" such a strategy seems contrived.

Fischl also contends that the district court erred by proceeding to rule on his Sixth Amendment ineffective assistance of counsel claim without holding an evidentiary hearing. Title 28 U.S.C. § 2255 states that "[u]nless the motion [to vacate sentence] and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon." "A hearing is not necessary in cases where a § 2255 motion 'is inadequate on its face, or (2) although facially adequate, is conclusively refuted as to the alleged facts by the files and records of the case.'" *United States v. Carbone, 880* F.2d 1500, 1502 (1st Cir. 1989) (citation omitted).

Fischl suggests that an evidentiary hearing is required to determine whether or not the agreed-upon strategy at trial was to let Kerkman present Fischl's defense. An evidentiary hearing would add nothing to the inquiry relating to Fischl's ineffective assistance of counsel claim. First, whether or not the agreed upon trial strategy included using Kerkman to provide Fischl's defense is a clear-cut conflict in testimony between Fischl and his counsel. Fischl claims that such was the strategy; trial counsel says it wasn't. Fischl does not tell

us what more an evidentiary hearing possibly could show. Moreover, the relevant record, as expanded by the deposition of trial counsel, strongly suggests that Fischl's claim on this score cannot be taken seriously. From the beginning, Fischl (through counsel) put on the record his fear that Kerkman's testimony would prejudice Fischl's case:

> In the present case, if co-defendant Kerkman elects to testify in his own behalf, we can only assume that his testimony will be consistent with his prior statements. If this is the case the pressure on defendant Fischl to abandon his privilege against self-incrimination so as to refute the accusations of his co-defendant will be overwhelming and irresistible [sic]. This extraneous pressure to forego precious Constitutional rights is impermissible and it can be avoided only by granting of a severance.
>
> ....
>
> ... With this air of hostility and personal animus, it is fair to conclude that if co-defendant Kerkman feels he is going down to conviction, he will attempt to drag defendant Fischl along with him. This is not a fair or equitable context within which to try the case against defendant Robert D. Fischl. To avoid this prejudicial setting, a severance should be granted.

J.A. at 31-33. The record suggests that Kerkman was considered an unpredictable witness who might well damage Fischl's case with respect to (at least) the tax charges. As the district court wrote:

> Relying on Kerkman for a defense would have been a risky trial strategy, at least to this Court's thinking, and would constitute representation far more suspect under *Strickland* than resting. Trial counsel felt that

> the government had failed to prove knowledge and intent on the part of Fischl, partly because of a lack of specificity. Kerkman could have provided specifics. Also, the jury may have disbelieved Kerkman, given his admittedly volatile nature, and used that disbelief against Fischl.... [I]t might well have been irrational to have wanted Kerkman to provide the defense to Fischl, especially, when at the close of the government's proofs, the case looked so favorable to the defense.

J.A. at 223. The record indicates that Kerkman would not have helped Fischl's case and might well have hurt his case. Relying on Kerkman for Fischl's defense might well be considered so "risky" as to be "irrational." *Id.* Fischl's trial counsel presents the more objectively reasonable view, and Fischl alludes to nothing that might have arisen at an evidentiary hearing to discredit it. The hearing was properly denied.

B. Due Process and Bifurcation

Fischl contends that the district court erred by, *"sua sponte,"* deciding to bifurcate the trials of Kerkman and Fischl midstream. He raises the claim that "to send Fischl's case to a jury that had heard twelve days of incriminating evidence against Co-Defendant Kerkman and nothing on behalf of *either* Kerkman or Fischl," Fischl's Br. at 19, violated his right to due process of law. We agree with the district court that this decision was made only with the consent of Fischl, in his presence, through counsel. The renewed motion to sever was granted only after the district court had confirmed that Fischl's motion to sever was still on the table. *See* J.A. at 888, 891. Second, on the merits of Fischl's due process argument, the district court concluded that "the case as it

related to Fischl was completed at the time of the severance of the case against co-defendant." *Id.* at 213. We agree with the district court that *Fischl* cannot, in good faith, claim that his own due process rights were violated by not letting his jury hear Kerkman's defense.

Fischl continues to maintain in his Reply Brief that, though he moved for severance *before* the joint trial began, the decision to sever *after* the government presented its case against Kerkman and Fischl was made by the district court *sua sponte*. *This sua sponte* decision was merely "acquiesced in by counsel" for Fischl. Fischl's Reply Br. at 6. *See* J.A. at 474 (deposition testimony of trial counsel for Fischl) ("Well, first of all, I didn't renew the motion. At no time did I tell the Judge, 'Judge, I want a severance now.' That was the Judge's decision. He asked me whether or not the motion was still viable or whether we had withdrawn it, and I had indicated that the motion had not been withdrawn. And the reason for my comment that the motion had not been withdrawn was to protect the record."). Fischl also maintains that he was prejudiced by the midstream severance. Fischl's real bone of contention lies with the fact that the Kerkman/Fischl case was not severed at the outset. But we determined in *Fischl I* that "it was eminently appropriate for the two men to be tried together. The discrimination the jury showed in convicting Mr. Fischl on some counts and acquitting him on others strengthens that conclusion, but is not essential to it. The joinder did not prevent Mr. Fischl from receiving a fundamentally fair trial . . ." 797 F.2d at 313. In the instant appeal, Fischl is merely trying to assert once more his prior severance argument.

Fischl's objection to the fact that his jury was able to hear the government's case against Kerkman without hearing Kerkman's defense to it is without merit. The presentation of evidence against both Kerkman and Fischl saved judicial resources. See *United States v. Horton*, 847 F.2d 313, 317

(6th Cir. 1988) ("There is a strong policy in favor of joint trials when charges will be proved by the same series of acts . . . .") (citation omitted). When Fischl chose to rest without putting on any evidence, his case was closed. Any adverse inferences from the government's case against Kerkman were effective quashed by the district court's instructions to the jury. Indeed, Fischl concedes that the jury was properly instructed not to consider Kerkman's case when evaluating Fischl's case. *See* Fischl's Reply Br. at 10. Furthermore, "we presume that the jury will be able to sort out the evidence applicable to each defendant and render its verdict accordingly." *United States v. Blakeney*, 942 F.2d 1001, 1011 (6th Cir. 1991). In fact, we specifically found the presumption to exist in this case. *Fischl I*, 797 F.2d at 313. Whether or not the decision to sever midstream was *sua sponte* or on motion by Fischl's counsel, Fischl's due process argument fails.

Fischl's assertion of error because no evidentiary hearing was held on the issue of whether the severance was *sua sponte* or pursuant to a motion by counsel for Fischl must also fail. Even if the decision to sever/bifurcate was *sua sponte*, Fischl cannot be said to have been prejudiced by the decision for the reasons stated. Thus, since the "motion [to vacate sentence] and the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U.S.C. § 2255, no hearing was or is required.

C. Government's Alleged Use of False Testimony

Fischl contends that the government's case against him consisted, in every material respect, of false testimony that the government knew was false. Absent such allegedly false testimony, Fischl claims. "no rational trier of fact would have found proof of guilt beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. 307, 324 (1979). Furthermore, the fact that many of the alleged falsehoods could have been discovered by trial counsel before the jury retired to deliberate[3] in Fischl's view, adds to his claim that counsel was ineffective and that such ineffectiveness prejudiced his case. Fischl thus contends that both prongs of the two-pronged *Strickland* test are implicated and satisfied by the failure of trial counsel to "expose[] the Government's case as the tissue of lies that it is," Fischl's Br. at 25.

The district court quoted *United States v. Shaid*, 916 F.2d 984, 987 (5th Cir. 1990), holding that "any purported error not of [constitutional or jurisdictional] magnitude may only be considered under a section 2255 motion if it could not have been raised on direct appeal and, if condoned, would result in a complete miscarriage of justice." J.A. at 225. The court held that Fischl had not raised his insufficiency-of-the-evidence arguments on direct appeal, and has not shown cause why he did not, thus obviating the need to address the merits of Fischl's contentions on this score. The court also considered the evidentiary arguments to be "unrelated to the claim of ineffective assistance of counsel." *Id.*

Fischl responds to these arguments along many lines. Concerning the district court's dismissal of his evidentiary claims on procedural grounds, he argues that the procedural "cause and prejudice" rule invoked by the district court does not apply to *constitutional* claims, and knowing use of false testimony implicates constitutional due process. Second, he contends that the alleged falsity of much of the testimony could not have been known prior to the direct appeal to this court because it was revealed during the retrial of co-defendant Kerkman which occurred *after* this court's opinion

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[3] For example, some of the alleged falsehoods are supposedly obvious from a comparison of trial testimony and grand jury testimony/documentary evidence adduced at trial, *see* Fischl's Reply Br. at 12-13 & nn. 19, 21.

in *Fischl I.*

We have held that for a defendant to successfully assert that the conviction was obtained with the use of testimony that the prosecution knew was false, "the moving party must show that the statements were material, that they were actually false, and that the prosecution knew they were false." *United States v. Hawkins*, 969 F.2d 169, 175 (6th Cir. 1992). Fischl cannot meet this burden. To avoid the procedural bar otherwise in effect due to his failure to raise this issue on direct appeal, Fischl relies heavily on the fact that some of the alleged material falsehoods could not have been known until after his direct appeal because the contradictions became apparent at the retrial of Kerkman. If it is true, however, that Fischl could not have realized the alleged falsity of the statements given at his own trial because of the inconsistencies revealed at Kerkman's trial, it is not clear why the government would have known the inconsistencies earlier. The third prong of the *Hawkins* test is not met. Alternatively, if Fischl were aware of the use of false testimony at the time of trial or on appeal, the claim is not cognizable in this § 2255 action. As the Seventh Circuit stated in *Anderson v. United States*, 403 F.2d 451, 454 (7th Cir. 1968) (emphasis added):

> The knowing use by the Government of perjured testimony in order to obtain a conviction would, if proved, be grounds under section 2255 for vacation of a conviction *under circumstances such as exist here where the petitioners assert that they were unaware of the alleged perjury both at the time of the trial and the appeals.*

See also Theodorou v. United States, 887 F.2d 1336, 1339 (7th Cir. 1989) ("We have made it clear ... that a district court cannot reach the merits of an appealable issue in a

section 2255 proceeding unless that issue has been raised in a procedurally appropriate manner.... As we have reiterated, a petition under section 2255 'will not be allowed to do service for an appeal.' . . . These cases have clearly confirmed our position ... that a failure to raise *constitutional challenges to a conviction* on direct appeal bars a petitioner from raising the same issue in a section 2255 proceeding -- absent a showing of good cause for and prejudice from the failure to appeal.") (emphasis added); *see also Cross v. United States*, 893 F.2d 1287, 1289 (11th Cir. 1990) ("In a section 2255 federal habeas motion, a movant may not raise claims that were not presented on direct appeal unless he can show cause excusing his failure to raise the issues previously and actual prejudice resulting from the errors."). Fischl has not demonstrated sufficient "good cause."

D. Restitution

Under 18 U.S.C. § 3651 (repealed effective Nov. 1, 1987 and not applicable to offenses committed *after* that date):

> While on probation and among the conditions thereof, the defendant--
>
> ....
>
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had
>
> ....

At sentencing, the district court ordered Fischl to make restitution payments to the State of Michigan in the amount of the illegal kickback at issue in the case, $232,719.45, as a condition of probation. This amount was later reduced to $116,359.50 after Kerkman, the co-defendant in the kickback

case, was convicted. Fischl contends that the restitution order is *ultra vires* because the State of Michigan did not suffer "actual damages or loss" by the kickback scheme. The State of Michigan was obligated by the terms of the contract with UPSCO to pay $35.5 million whether or not Fischl and Kerkman received the MaK kickback. The district court refused to consider the merits of this issue because Fischl did not show good cause why the claims were not raised on direct appeal. Fischl contends that the trial court did not have jurisdiction under federal statutes to impose the restitution amount that it did, rendering its judgment *ultra vires*. Jurisdictional challenges to a conviction and sentence, he argues, are not waived by failure to raise them on direct appeal. *See Shaid*, 916 F.2d at 987 ("Any purported error *not of [constitutional or jurisdictional] magnitude* may only be considered under a § 2255 motion if it could not have been raised on direct appeal and, if condoned, would result in a complete miscarriage of justice.") (emphasis added).

Assuming without deciding that Fischl's reading of *Shaid* is correct, we disagree with his conclusion on the merits. We rejected the argument he raises and found a cognizable economic loss from the kickback scheme in *United States v. Kerkman*, 866 F.2d 877, 880-81 (6th Cir. 1989):

> Kerkman argues that the jury could not have found the deprivation of any money or property because the Michigan Department of Transportation awarded a fixed price contract. Kerkman asserts that under this contract [UPSCO) was entitled to $35.5 million, so long as it completed [construction of four] barges [and a tugboat]. Therefore, the kickback cost Michigan nothing. Moreover, Kerkman argues that by hiding the kickback Michigan was deprived of only an intangible right to information.

This argument is without merit. In *United States v. Fagan*, 821 F.2d 1002, 1009 (5th Cir. 1987), *cert. denied*, [484 U.S. 1005 (1988), a case decided after and in light of *McNally[v. United States*, 483 U.S. 350 (1987)], the Fifth Circuit concluded that [18 U.S.C. § 1341, the mail fraud statute,] protects ."economically material information" which an employee has reason to believe "would lead a reasonable employer to change its business conduct."

. . . .

[K]nowledge of the ... kickbacks was "economically material information" which might have induced the Michigan Department of Transportation "to change its business conduct." By hiding the kickback, Kerkman led the Department of Transportation to part with "its control over its money ... on the basis of a false premise" in several ways.

First, a reasonable jury could have found that Kerkman and Fischl obtained the first $1 million of the advance under false pretenses by misrepresenting the amount of the engine down payment. The contract called for an advance of $3.5 million by October 1, 1979. The Department of Transportation had agreed, however, to make $1 million available on July 3, 1979. It was led to believe that the money would be used for engine down payments and administrative expenses. Instead, Kerkman and Fischl diverted a portion of the money to purchase a valuable asset, vessel plans, for Lake Link and [UPSCO]. Consequently, Kerkman and Fischl gained an important future economic advantage since future tugs would require use of the same plans. A

> reasonable jury could have found that Kerkman and Fischl misrepresented the amount of the down payment in order to divert a portion of the advance to purchase this valuable asset for their companies. The Department of Transportation was thus deprived of a valuable property interest, namely, the use of $1 million for two months.
>
> Kerkman and Fischl also arguably obtained the $2.5 million balance of the advance under false pretenses. They knew that the Department of Transportation was concerned about conflicts of interest. They also knew that under the terms of the contract disclosure of the kickback would entitle the Department of Transportation to cease payment of the advance and terminate the contract. When the Department of Transportation conducted an audit of the balance of [UPSCO] prior to payment of the balance of the advance, Kerkman deprived it of economically material information about the kickback. A reasonable jury could have concluded that Michigan would not have parted with its $2.5 million had Kerkman not deceived the Department of Transportation.

Given our finding in *Kerkman* of a cognizable "loss" to the State of Michigan as a result of the kickback scheme, an order of restitution on the basis of that loss was reasonable. While choosing the amount of the kickback as the amount of restitution may not have been perfect, it is less than the $2.5 million or more that might have been assessed. Fischl cannot demonstrate any prejudice from the asserted error.

E. Reliance on Evidence Not in the Record

In sentencing Fischl, the district court noted that it felt that Fischl was not "entirely honest with himself or with [the court] about what has happened." J.A. at 937. The court went on to discuss whether or not Fischl really knew of the kickback scheme apparently concocted by Kerkman. In this context, the court stated:

> Then as I recall it, Mr. Fischl received two telephone calls while Mr. Kerkman was in Germany. The first call as I recall it simply urged Mr. Fischl to expedite the down payment [to MaK]. If he hadn't been informed in the past, he was informed as to the exact amount of Deutschmarks necessary. A day or so later, while Mr. Kerkman was still in Germany, Mr. Kerkman made a second call to Mr. Fischl which Mr. Fischl today does not dispute with the exception of the content. The witness, and I believe it was *Kuehl* -- it may not have been -- *testified at the trial,* and it was unrebutted that *Mr. Kerkman told Mr. Fischl if you don't get the money to me I don't get the commission* ....

Id at 939 (emphasis added). Fischl argues that Kuehl gave no such testimony. In fact, Fischl claims, Kuehl gave testimony which actually conflicted with the district court's recollections. Since, Fischl asserts, the sentence imposed was "admittedly ... premised," Fischl's Br. at 47, on this misreading of the trial record, Fischl's right to due process of law was violated. *See Townsend v. Burke,* 334 U.S. 736, 740-41 (1948) ("[W]e conclude that ... the prisoner was sentenced on the basis of assumptions ... which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of

law, and such a conviction cannot stand."). The district court dismissed this claim on procedural grounds, asserting that Fischl had failed to show good cause why he did not raise this claim on direct appeal.

Though addressing a different issue, the district court did respond to Fischl's assertion that the district court mischaracterized Kuehl's testimony:

> Fischl notes several responses by Mr. Kuehl both during cross-examination and also during direct examination in support of his contention that the testimony cannot be fairly characterized as I had suggested at sentencing. However, Fischl's position is in reality just a difference of opinion regarding the credibility of the various statements made by Mr. Kuehl. Mr. Kuehl did in fact testify that "to the best of [his] recollection, Mr. Kerkman told Mr. Fischl that he is taking back a check, that he has to wait for the down payment." Trial Transcript at 1173. This statement, when combined with the evidence concerning Fischl's involvement in the engine purchase and the communications to auditors, the state, Senator Mack, and the I.R.S., certainly supports the interpretation that this Court gave at sentencing.

J.A. at 207-08.

Even if Fischl's claim is not barred on procedural grounds for failure to raise the issue on direct appeal when all the necessary facts were in existence, *see Theodorou*, 887 F.2d at 1339, the contested statement made at sentencing fairly paraphrases the record evidence. Even without Kuehl's testimony regarding the telephone call, there was sufficient evidence to indicate that Fischl really did know that Kerkman had illegally acquired the kickback checks. Furthermore, even if the district court's paraphrase was slightly inaccurate,

it did not violate Fischl's right to due process at sentencing. Fischl has picked out one statement in a very lengthy summary by the district court of the evidence presented against him and claims that it misstates the record. On review of the entire record, the district court's interpretation of the testimony is not unreasonable. To assert a constitutional due process violation on the basis of an arguable but not unreasonable summary of a small slice of the evidence presented against Fischl is completely insufficient to warrant reversing the sentence imposed.

F. Disqualification of the District Court

Fischl argues that, on "further consideration of this case," Fischl's Br. at 47, or "on remand," id. at 50, the case should be assigned to a different district court judge than the one who ruled on the motions. He claims that the district court judge has clearly demonstrated a "striking pattern of misperception," id. at 49. Since there will be no remand or further consideration of this case, we do not reach this issue.

III.

The district court was correct in its treatment of the myriad issues raised by the defendant in this habeas proceeding. For the foregoing reasons, we conclude that Fischl has presented no meritorious grounds for vacating his sentence. We therefore AFFIRM the judgment of the district court in all respects.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-2092
Robert D. Fischl
v.
United States of America

Order Denying Rehearing

Filed December 28, 1993

BEFORE: MERRITT, Chief Judge; JONES and NELSON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green/pe

Leonard Green, Clerk

APPENDIX D

EXCERPTS FROM TRANSCRIPT OF DEPOSITION

January 20, 1992

Robert Daavettila, Witness

DIRECT EXAMINATION

BY MR. GEZON:

* * * *

[15] Q The suggestion is made in Mr. Fischl's present pleadings that your defense was going to be to let Mr. Kerkman present a case for you on your behalf and present witnesses. Can you comment on that?

A That's not my recollection at all. I was not relying on Mr. Meldman or Mr. Kerkman to carry the ball for Bob Fischl. Again, as I say, as it relates to the nature of the payment, I didn't think that Kerkman could hurt us without hurting himself in a big way, but I was concerned on the other issues that Kerkman may prove to be something of a problem on the tax questions.

* * * *

[17] Q Can you tell us why, as a trial strategy, you wanted to sever this case in the first place?

A I thought Bob Fischl -- and I continue to think that Bob Fischl was prejudiced by having his case tried jointly with Kerkman. And I think the -- the one thing that stands out in my mind after these many years, however it's been -- frankly, I couldn't even tell you what year this case was tried. But the one thing that stands out in my mind is that the government had a couple of Telexes, which they had printed

up to poster size, that Kerkman had sent to Germany, and I felt an almost perceptible chill in the courtroom after those exhibits were admitted into evidence.

We got a curative instruction, I believe, from Judge Enslen on those, but, you know, I've tried a good number of cases and I'm not a great believer in curative instructions that tell a jury to think of this evidence only in this limited category as opposed to as the -- toward the case as a whole. And that evidence, I thought, was very prejudicial to Bob Fischl, even thought I don't think the government ever tied him to those Telexes. And I think that Kerkman -- or excuse me. I think that Bob Fischl was prejudiced by having to go to trial where that kind of baggage came in. And I continue to believe that. Obviously, the Court of Appeals doesn't -- or didn't agree.

* * * *

CROSS-EXAMINATION

BY MR. HANKINS:

* * * *

[20] Q And you stated that you met with him relative to his decision and your decision in recommending that he not take the stand, correct?

A That's right.

Q Do you recall when that meeting took place?

A There were -- in terms of specifics I can't -- I can't be absolutely sure as to when the first time was that we had talked earnestly about our resting and his not taking the stand. My guess is that it was towards the end of trial, but I can't really be more definite than that. And there were -- there was also a discussion that Kerkman and Mr. Meldman were a part of. I think Bob wanted to get input from Mr.

Meldman regarding his decision not to testify.

I recall meeting in the hallway of the federal building in Kalamazoo where Bob wanted input from Meldman with respect to this issue and there was such a meeting that was held. And I think that it -- we certainly discussed it the evening before and probably some days in advance of that, but, you know, to nail that down to three days, four days a week, I couldn't tell you.

* * * *

[31] Q Fischl was part of that in-chambers meeting; right?

A I believe he was there, yes.

Q And do you recall your conversations with him, if any, immediately after leaving the Judge's chambers?

A Yes. I remember some of our conversation at least.

Q Would you relate that to me?

A All right. I remember Bob questioning what was going on, what was the import of the Judge's comments, and what -- we talked about our position in the context of the motion to sever. I recall telling him that I felt that he had been prejudiced by a joint trial. I recall telling him that if we had withdrawn our motion for severance, if we had told the Judge that the motion had been withdrawn, that there was at least a possibility that, if he should be convicted, that issue might be considered to have been waived by his withdrawal of it, even thought he had been -- I think the damage, frankly, had been done. I thought that there was certainly that possibility. I would expect the government to at least argue that point on appeal if it became necessary. And I reiterated that the government really had not presented a convincing case for his guilt, in my opinion.

* * * *

REDIRECT EXAMINATION

BY MR. GEZON:

[35] Q (By Mr. Gezon) At one time they began a joint business venture in this case and had a very positive relationship. How would you describe it at the time of the trial?

A Certainly, going into the trial it was not a very good relationship at all. There had been a breakup. There had been -- if I recall, there had been threats that Kerkman had made to Fischl. There were, I thought, some ill feeling between the two of them. I think as the trial went on and we had our various meetings, things warmed up a little bit, but the relationship between Charles Kerkman and Robert Fischl I think had been damaged by the nature of Kerkman's ouster or by the fact of Kerkman's ouster from UPSCO.